

Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

BNSF RAILWAY COMPANY,

Plaintiff,

v.

CLARK COUNTY, WASHINGTON;  
MITCH NICKOLDS, in his official capacity  
as Director of Community Development of  
Clark County; KEVIN A. PRIDEMORE, in  
his official capacity as Code Enforcement  
Coordinator of Clark County; and  
RICHARD DAVIAU, in his official  
capacity as County Planner of Clark County,

Defendants.

No.: 3:18-cv-5926-BHS

**STATUS REPORT REGARDING  
PLAINTIFF BNSF RAILWAY  
COMPANY'S MOTION FOR A  
PRELIMINARY INJUNCTION**

Note on Motion Calendar:  
December 19, 2018

Plaintiff BNSF Railway Company ("BNSF") hereby files this status report to update the Court and the parties on changed circumstances since the filing of BNSF's pending motion for a preliminary injunction, *see* Dkt. # 8, currently scheduled for hearing on December 19, 2018, *see* Dkt. # 16.

The railroad track construction project at issue in this case is scheduled to be substantially completed on December 17, 2018. *See* Declaration of Donald R. Omsberg filed herewith, at ¶ 6. Barring unanticipated events (such as severe weather), BNSF intends to put the new track "in-

1 service” on that date, meaning that the new track will be open and available to receive normal  
2 train traffic. *See id.* BNSF expects to perform some additional work following the completion  
3 of the Construction Project on December 17, 2018. For example, BNSF plans to remove the old  
4 turnout from the area in segment one of the Construction Project, perform cleanup work in that  
5 area, and reseed disturbed areas in compliance with federal permits. *See id.* at ¶ 7.

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7 Counsel for BNSF contacted counsel for the defendants and proposed intervenor-  
8 defendants on December 12, 2018, to advise them of the planned in-service date and to  
9 determine whether this new development obviated the need for BNSF’s pending preliminary  
10 injunction motion (and might allow the parties to present their legal dispute to the Court on  
11 motions for summary judgment). *See* Supplemental Declaration of James M. Lynch filed  
12 herewith, at ¶ 2. Responses received from defendant Clark County and proposed intervenor-  
13 defendant Columbia River Gorge Commission indicated to BNSF that the threat of enforcement  
14 action remains extant during the pendency of this litigation. *See id.*, Ex. A. In particular, those  
15 responses indicated that the County or Commission may seek abatement against the new track  
16 (e.g., a proceeding to force BNSF to remove the new track), or other remedies. Because the  
17 threat remains of imminent enforcement action that BNSF contends is unlawful, BNSF intends to  
18 proceed with its motion for a preliminary injunction as scheduled.  
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20 Respectfully submitted,  
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